NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS NAMED OLIVIA AND KIRSTEN IN THIS JUDGMENT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011 AND S 139 OF THE CRIMINAL JUSTICE ACT 1985.

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF PERSON NAMED M IN THIS JUDGMENT REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

SC 81/2016
[2016] NZSC 129

BETWEEN	ALISTAIR STUART LYON Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: D P H Jones QC for Applicant
A Markham for Respondent

Judgment: 29 September 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was tried on charges relating to his conduct with five young women, two of whom have been referred to as "Olivia" and "Kirsten".[1] The charges encompassed the abduction of Olivia, non-consensual sexual activity with her and Kirsten, breaches of the Prostitution Reform Act 2003 and supplying and offering to

[1] The complainants are entitled to name suppression. The Court of Appeal used fictitious names to protect the identity of the complainants. We have adopted the naming scheme used in that Court.

supply class A and class B controlled drugs. He pleaded guilty to other charges under the Arms Act 1983. He was found guilty of 15 charges, including those relating to the abduction and sexual violation of Olivia and the sexual violation of Kirsten. He was subsequently sentenced to 15 years imprisonment.[2]

[2] His appeal against conviction and sentence was dismissed by the Court of Appeal.[3] His proposed further appeal to this Court is based on the contention that he suffered a miscarriage of justice by reason of the way in which he was defended at trial. The same complaint was advanced to the Court of Appeal which heard evidence from the applicant and his trial counsel, Mr Mark Ryan and Ms Annabel Ives. The Court also had an affidavit from the applicant's commercial solicitor Mr Richard Phillips who had some, but limited, involvement with the trial. There is no point of law involved in the proposed appeal and the application for leave to appeal must therefore be assessed in terms of the miscarriage ground.

[3] Mr Ryan obtained specific written instructions in respect of the applicant's election not to give evidence. But in other respects Mr Ryan's record of his instructions from the applicant was limited and in very general terms and no brief of the applicant's evidence was prepared. This set the scene for the applicant to advance a number of criticisms of Mr Ryan in the Court of Appeal. The principal criticisms and the responses to them were as follows:

(a) The failure to prepare a brief of the applicant's evidence contributed to what the applicant claimed was a failure by Mr Ryan to ascertain the precise details of his defence in relation to each charge. As well, in the absence of a brief of evidence and given the way in which Mr Ryan had cross-examined the complainants, it would not have been practicable for the applicant to have given evidence. Mr Ryan's response was that, from a reasonably early stage in the proceedings, the applicant was of the view that the complainants would not give evidence against him and that there was therefore no occasion for him to provide an explanation. Mr Ryan said that he had ascertained the

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2 *R v Lyon* DC Auckland CRI-2012-004-3519, 19 December 2014 (Judge Collins).
3 *Lyon v R* [2016] NZCA 293 (Winkelmann, Peters and Collins JJ).

defences which the applicant wished to advance and that these were recorded accurately, albeit in general terms, in a letter of instructions which the applicant signed.

(b) The defence advanced at trial in relation to the abducting and sexual violation charges in respect of Olivia was that the applicant was not involved with her abducting and had not engaged in any sexual activity with her, with misidentification being advanced as the defence. The applicant's position is that he had made it clear to Mr Ryan that he acknowledged sexual activity with Olivia but thought that she consented. The general thrust of Mr Ryan's evidence in the Court of Appeal was to the effect that the first time that the applicant acknowledged sexual activity with Olivia was in a discussion which took place at the end of the Crown case.

(c) The defence advanced in relation to the sexual violation charge in respect of Kirsten was consent. The applicant maintained that his position, as explained to counsel, was that there had been no sexual contact on the occasion in question.[4] This was denied by Mr Ryan.

[4] The Court of Appeal broadly accepted the evidence of Mr Ryan and, in doing so, rejected that of the applicant.[5] It concluded that the defences advanced by Mr Ryan were in accordance with his instructions and that his conduct of the case did not give rise to a miscarriage of justice. The Court was also of the view that the applicant had been cagey about providing anything in the nature of a brief of evidence; this given his confidence that the complainants (or most of them) would not give evidence. It was of the view that Mr Ryan's advice to the applicant not to give evidence was "the only advice that could have been responsibly given". Had the applicant given evidence, he would have faced formidable difficulties in cross-examination.

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4 The charges in relation to Kirsten related to two occasions. She did not come up to brief in respect of the second occasion and the applicant was discharged on the charges relating to that occasion.

5 At [80].

[5] Counsel for the applicant criticised the Court of Appeal for having made what he called a "default finding of credibility … in favour of counsel over the client". He also maintained that the judgment overlooked a number of difficulties with the evidence given by Mr Ryan. His argument was heavily focused on a retraction statement which Olivia had signed. Given this focus, we will discuss the challenge to the Court of Appeal's findings primarily by reference to the retraction statement.

[6] The retraction statement is expressed elliptically and in particular, it is not explicit as to whether there was sexual activity between Olivia and the applicant on the occasion in question. The statement did, however, put the applicant in a room with Olivia at a time when she was naked and secured in a bondage device. The statement suggested that the applicant could have believed that she was consenting to whatever was going on and it is perhaps implicit in the statement that this extended to sexual activity between her and the applicant. The applicant gave this statement to Mr Ryan well before trial and claimed that he told Mr Ryan that what was said in the statement recorded what had happened. Mr Ryan accepted that this may have happened. The applicant maintains that this shows that the applicant's defence in relation to the sexual violation charge, as conveyed to Mr Ryan, was honest belief in consent. As well, it was said that some answers which Mr Ryan gave under cross-examination in the Court of Appeal amounted to acceptance that this was so.

[7] Despite the apparent support which the retraction statement (along with the associated evidence of the applicant and Mr Ryan) provided for the applicant's contentions in respect of this part of the case, there are many factors which went the other way. These factors include (but are not confined to):

(a) The uncertain provenance of the retraction statement. Mr Ryan appears to have been understandably uneasy as to how it had been obtained. The retraction statement came to the Judge's attention during a voir dire hearing into Olivia's evidence. His response was to revoke the applicant's bail. The applicant's attempt to provide a provenance for the statement in his evidence in the Court of Appeal was not credible. This cast a serious shadow over the balance of his

evidence. More generally, the level of uncertainty and suspicion attached to the retraction statement suggests that the close reading devoted to it when Mr Ryan was cross-examined in the Court of Appeal was unrealistic.

(b) The applicant listening without complaint to Mr Ryan cross-examining Olivia during the voir dire on the basis of the misidentification defence. If his defence was that he had engaged in sexual activity with Olivia but believed it was consensual, he could have been expected to complain.

(c) When Olivia was giving evidence in front of the jury, the applicant shouted out that she was a "P-whore" and that he would not "put his penis in her".[6] This outburst is consistent with Mr Ryan's evidence.

[8] Broadly similar considerations apply in relation to the charge of sexual violation in respect of Kirsten. Although succinct to the point of being elliptical, the written instructions obtained by Mr Ryan suggested that the applicant had engaged in sexual activity with Kirsten, albeit of a consensual nature and he practically acknowledged as much when interviewed by the police (when he admitted having paid her money). Contemporaneous text messages originating with the applicant were consistent with that. And the applicant was in court when Mr Ryan cross-examined Kirsten on the basis of consensual sexual activity and made no complaint.

[9] Against that background, we see no appearance of a miscarriage of justice in the findings of the Court of Appeal.

[10] There being no point of law involved and no appearance of a miscarriage of justice, the application for leave to appeal is dismissed.

Solicitors:
Barter & Co, Auckland for Applicant
Crown Law Office, Wellington for Respondent

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[6] Evidence to this effect was given by Mr Ryan. He was not challenged on it and it was referred to in the submissions made in the Court of Appeal. Presumably because of the way the evidence came out and the order of witnesses, the applicant was not cross-examined on this point.